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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ERICKSON CABRERA,

Plaintiff,

v.

16 CV 1098 (GBD)

THE CITY OF NEW YORK,

Defendant.

-----x

New York, N.Y.

May 11, 2017

11:02 a.m.

Before:

HON. GEORGE B. DANIELS,

District Judge

APPEARANCES

HARVIS & FETT LLP

Attorneys for Plaintiffs

GABRIEL HARVIS, ESQ.

ZACHARY CARTER, Corporation Counsel

for the City of New York

Attorney for Defendant

PAUL HASAN JOHNSON, ESQ.

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(Case called)

(In open court)

THE DEPUTY CLERK: 16 CV 1098. Cabrera v. City of New York, et al. Counsel, state your appearances, starting with plaintiff.

MR. HARVIS: Gabriel Harvis of Harvis & Fett for plaintiff.

MS. FETT: Good morning, your Honor. Baree Fett for plaintiff, Mr. Cabrera.

MR. JOHNSON: Paul Johnson for New York City and Police Officers Brian Dennis and Sergeant Caraballo.

THE COURT: Good morning. You know what, I'd like to first hear from the plaintiff, because I want to sort of narrow the issues here. First of all, let me -- I wasn't quite sure what the parties' positions were with regard to the claim against the City. What's at this point, do you have a claim against the City?

MR. HARVIS: We have claims against the City that are derivative under respondeat superior for the state law claims. We don't have a direct constitutional claim against the City.

THE COURT: I wasn't sure whether there was a respondeat superior claim under these circumstances.

MR. HARVIS: Sure, your Honor. The officers were acting as employees of the City of New York when they committed these acts, so under state law the City is responsible for

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1 their conduct. We filed a timely notice of claim and the
2 claims appear in our pleadings.

3 THE COURT: And which claim is that?

4 MR. HARVIS: That would be false imprisonment under
5 state law.

6 THE COURT: I'm just trying to figure out from looking
7 at your complaint if you've alleged such a claim against the
8 City.

9 MR. HARVIS: Absolutely, yes. If you look at claim
10 number 3, if you look at paragraph number 42.

11 THE COURT: Claim number 3?

12 MR. HARVIS: This is on page 7. And it's also
13 paragraph 50, your Honor, as to the assault and battery claim
14 under state law.

15 THE COURT: Okay. So you are not pursuing claim 7?

16 MR. HARVIS: No. I apologize, your Honor. That was
17 an oversight. We are.

18 THE COURT: Okay, but that's a Monell claim and you
19 don't have any facts here that you put before me that there is
20 such a claim, if there's any facts for such a claim.

21 MR. HARVIS: Actually, it's my fault it was presented
22 that way. It's a negligence claim under state law for
23 negligently hiring the officers. It's not a claim that it was
24 pursuant to an unlawful policy or custom.

25 THE COURT: There's no such claim. It can't be. I

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1 mean, well, I shouldn't say there's no such claim, but there's
2 no such facts. I mean, there are no facts that you are relying
3 upon that indicate that when they were hired there was somebody
4 who shouldn't have been hired, that they had any information to
5 indicate that somebody shouldn't have been hired. I thought
6 you were trying to assert a claim of negligent training, but, I
7 mean, you don't claim there was anything in their backgrounds
8 or anything that the City was aware of when they were hired as
9 police officers that would have given them cause to not hire
10 them as police officers?

11 MR. HARVIS: As to the hiring claim, I agree with your
12 Honor and I'm prepared to withdraw that. As to the training
13 claim, I think it's a little bit less clear. They're certainly
14 going to be arguing that the actions they took were based on
15 the training they had.

16 THE COURT: Wouldn't the training claim have to be a
17 Monell claim?

18 MR. HARVIS: No. I mean, it does if you're alleging
19 it as a pattern of practice, but as long as there was
20 negligence in the training of these individual officers and we
21 file a timely notice of claim we can pursue that claim assuming
22 it's supported by the evidence.

23 THE COURT: I don't know, you haven't pointed to any
24 evidence that indicated that there's some training that they
25 did or didn't get that you say was negligent.

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1 MR. HARVIS: Yeah, I mean, I wish I had the
2 opportunity to -- I should have devoted more of the briefing to
3 that. The argument is basically they're going to say they did
4 as they were trained.

5 THE COURT: I'm not sure they're going to say that.
6 They're going to say they did what they felt was reasonable.
7 I'm not sure anybody asserted that the actions that they took
8 was some direction they were given by the Police Department. I
9 mean, I just, there's no discussion either way from either side
10 with regard to that somehow that they were taught the wrong
11 thing or they weren't taught the right thing.

12 MR. HARVIS: All right. I mean, yeah, I agree. It's
13 not, there isn't a ton of support for it in the record and I'm
14 not trying to argue the point.

15 THE COURT: And you all -- they also challenge your
16 failure to intervene. You could have alternative theories but
17 you can't have alternative facts. Where do you claim you're
18 going to prove that happened? I assume on the facts that
19 you've given me that both police officers were equally
20 responsible for making this arrest?

21 MR. HARVIS: Yes, I believe that is our allegation. I
22 just believe there's a universe of facts that the jury could
23 come to in which Officer Dennis was the one who was making the
24 actual fabrications and directly causing a constitutional
25 violation, but the sergeant was aware of it and took no action

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1 to stop it.

2 THE COURT: Took no action to stop it? That led to
3 the arrest or the prosecution or? That's why I wasn't clear.

4 MR. HARVIS: They sort of both take the -- they both
5 take credit for making the decision to arrest.

6 THE COURT: So they're both primarily principally
7 responsible independently through jointly making this arrest.

8 MR. HARVIS: Correct.

9 THE COURT: And I think they both physically
10 participated in the arrest. I don't know who put on the cuffs
11 or who said "you're under arrest," but they obviously jointly
12 arrested.

13 MR. HARVIS: That's our position. It really comes a
14 little bit later in the process because the evidence shows that
15 at approximately 6:14, if not earlier, there was a database
16 query that's done by Officer Dennis. It has his tax ID on it.
17 So at that point the trail leads a little bit more directly
18 from Dennis than it does through Caraballo, because Dennis is
19 doing the database queries and later talking to the DA giving
20 them the false evidence and swearing out the criminal
21 complaint.

22 THE COURT: So what is it that you say the other
23 officer at that point should have done related to what claim?

24 MR. HARVIS: So as the superior officer, Caraballo
25 testified in his deposition that he was aware of all of the

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1 process that I just described. So since he --

2 THE COURT: Aware of which process?

3 MR. HARVIS: That the database had been queried, there
4 were documents forwarded to the District Attorney's office and
5 statements made to the DA's office that ruled in the criminal
6 complaint.

7 THE COURT: Are there any statements where he said he
8 was aware of what's in that database?

9 MR. HARVIS: Well, yes, there is evidence in the
10 record of his deposition that Dennis came back and showed him
11 the results of these searches, and so that goes to both the
12 manufacture of evidence and malicious prosecution claim.

13 THE COURT: And the results were what? The evidence
14 of what that was was unclear to me. I looked at Exhibit 24.
15 It was just unclear to me how laid out exactly what you say was
16 the obvious --

17 MR. HARVIS: Let me explain that to your Honor. The
18 two exhibits germane to this issue are Exhibit 16 and Exhibit
19 24.

20 THE COURT: 16 is which one?

21 MR. HARVIS: 16 is one version of the database query.
22 What happened was when we first started this case, when we
23 first filed the case, in the initial disclosure we were given
24 the documents at Exhibit 16, that's one version of the database
25 query.

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1 THE COURT: I have 24 in front of me, but I don't have
2 16. How is 16 different from 24?

3 MR. HARVIS: I have a copy for your Honor. I'll tell
4 your Honor it's very straightforward. If you look at 16,
5 you'll see the first page, DEF 25, lists no record. The only
6 thing that's on there, that says any result is no record. It
7 says it three times.

8 THE COURT: Okay.

9 MR. HARVIS: Then, if you compare that over to Exhibit
10 24 and it's a little out of order in terms of, these are the
11 same results. But in Exhibit 24's version of the results at
12 the bottom it actually shows Mr. Cabrera's information whereas
13 in Exhibit 16 at the bottom it just says no results.

14 THE COURT: That's not exactly what it says at the
15 bottom. Are you talking at the bottom of page 1?

16 MR. HARVIS: If you look at the Bates number it says
17 DEF 0025? Exactly, it doesn't literally say no results at the
18 bottom, but there's nothing showing Mr. Cabrera as related to
19 these results on that page.

20 THE COURT: But these are two different runs.

21 MR. HARVIS: Let me show you that.

22 THE COURT: Because they're at different times.

23 MR. HARVIS: They're not, actually, your Honor. Only
24 because, as I said, these two exhibits show the results out of
25 sequence. So let me show you which ones actually compare. I'm

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1 sorry.

2 THE COURT: That's why I was confused.

3 MR. HARVIS: I apologize. This is the way the
4 documents were produced to us. Let me show you the exact
5 documents to compare. If you look at the one marked DEF 25 on
6 Exhibit 25 and you look at the ones marked DEF 275 to 276,
7 those are the two that line up.

8 THE COURT: I'm sorry, you said 275 --

9 MR. HARVIS: Exactly. To 276.

10 THE COURT: To 276 is what, page 25?

11 MR. HARVIS: Yes. Exactly. Correct, your Honor.

12 THE COURT: But I have more columns. So --

13 MR. HARVIS: That's right. So the important part to
14 look at here is that the time is the same, the serial number is
15 the same and the tax ID is the same between the two documents.

16 THE COURT: So the first block is the same on each
17 page. The second block is the same on each page. The third
18 block is the same on each page. The fourth block is different.

19 MR. HARVIS: Correct. And, incidentally, on Exhibit
20 24 there's a second page to the results as well.

21 THE COURT: Oh, I see. But the fifth block on 75 is
22 the fourth block on 25?

23 MR. HARVIS: Correct.

24 THE COURT: So what you're saying is missing from 25
25 is the fourth block on 75, which indicates Mr. Cabrera.

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1 MR. HARVIS: That's correct, your Honor.

2 THE COURT: As being the registered owner of the
3 vehicle?

4 MR. HARVIS: That's correct. Exactly right, your
5 Honor. And it's the same when you compare DEF 27 to DEF 277
6 through 81.

7 THE COURT: I'm sorry, say that again?

8 MR. HARVIS: When you compare DEF 27 from Exhibit 16
9 with DEF 277 through 81 of Exhibit 24.

10 THE COURT: That can't be true.

11 MR. HARVIS: Why?

12 THE COURT: 277 to 81 is more pages.

13 MR. HARVIS: It's just about the missing blocks, your
14 Honor. So because it has the same serial number, the same time
15 and the same tax ID. So, again, it's a matter of blocks being
16 removed. So instead of there being the additional pages that
17 would constitute pages 278, 279, 280 and 281, it's just
18 presented as a first single page.

19 THE COURT: So, okay. But 277 corresponds to page 27.

20 MR. HARVIS: Correct.

21 THE COURT: All right. So what is the next page after
22 27?

23 MR. HARVIS: Well, the reason why I want to focus on
24 those two, because those are the two that shows that
25 Mr. Cabrera, the active and valid licenses of Mr. Cabrera. The

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1 other page relates to the expired plate. I could show your
2 Honor, but I just don't think it's relevant because it's an
3 expired plate.

4 THE COURT: I just want to figure out why I'm
5 comparing the two. Is anything after 27 relevant?

6 MR. HARVIS: Well, no. The only thing that comes
7 after 27 you'll see the Bates stamps on the bottom of the page
8 after that, those are the Bates stamps that were produced by
9 the district attorneys of New York County as the search was
10 provided to them, so it's another copy as produced by the DA's
11 office.

12 THE COURT: So these pages correspond to something on
13 Exhibit 24?

14 MR. HARVIS: It's a duplicate. First three pages of
15 16 is the last three pages of 16. The only difference is the
16 first three pages were given to us by the defendants in this
17 case and the second three were given to us by the DA's office
18 in response to our subpoena.

19 THE COURT: The second pages of which document?

20 MR. HARVIS: 16. 16 is six pages. The first three
21 are from the City and an identical copy was produced from the
22 DA's office as having been provided to them by Dennis.

23 THE COURT: I'm still confused. Can I walk you
24 through? I see 77 on Exhibit 24 corresponds to 27 on Exhibit
25 16.

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1 MR. HARVIS: That's correct. Except, and then but
2 what it shows you is that what is 277 on Exhibit 24 is actually
3 a four-page document, but when it was provided to the DA's
4 office it was only provided as a one-page document that would
5 give the impression that there were no responsive results to
6 the query. Whereas, if you go on with the three pages of 24,
7 you'll see how it's all about Erickson Cabrera and how the
8 plates are valid and it's registered to him.

9 THE COURT: Exhibit 24 came from where?

10 MR. HARVIS: Exhibit 24 was produced in response to
11 Judge Francis' order during the course of discovery in this
12 case by the City.

13 THE COURT: Okay. And so Exhibit 24 was represented
14 to be what?

15 MR. HARVIS: It wasn't represented to be anything. We
16 got a Bates stamped page of production from the City that said
17 this is in response to Judge Francis' order.

18 THE COURT: What request were they responding to?

19 MR. HARVIS: The order said that the City should
20 produce -- one second -- quote, "any log-in information for the
21 license/registration checks performed in connection with the
22 plaintiff's arrest."

23 THE COURT: Okay. So where did -- what is the
24 evidence or the testimony with regard to this document?

25 MR. HARVIS: Sure. So, well, first, I just want to

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1 note, the City made an initial summary judgment motion relying
2 on what we see in Exhibit 16 to make the argument that there
3 were no responsive results in the query.

4 THE COURT: I understand.

5 MR. HARVIS: Then we get to Exhibit 24 and we have the
6 deposition of the officers and they provided no explanation
7 whatsoever.

8 THE COURT: Did the officers identify this document?

9 MR. HARVIS: They didn't -- yes, they did. I mean, it
10 was confusing because they didn't know what they were looking
11 at. They said, "What is this? I don't know what this is. I
12 can't explain it."

13 THE COURT: That's what I'm asking. They didn't say
14 that this was the radio run that they received?

15 MR. HARVIS: The database query that they ran, well,
16 they can't dispute it because it's their own tax ID that's on
17 the document.

18 THE COURT: I'm just asking you what the testimony
19 was. Did you ask them what this document was and did they
20 identify the document as the document that they ran received?

21 MR. HARVIS: Yes, they did, your Honor. And they also
22 said, they were confused because they said, well, if I had had
23 this document at the time I never would have charged
24 Mr. Cabrera. That's what the officer said and yet we have a
25 time stamp that shows that they had it on the date that he was

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1 arrested.

2 THE COURT: Okay, so what was -- again, I'm just
3 trying to get the facts straight. What was their testimony at
4 the deposition as to what they had in hand at the time that
5 they arrested Mr. Cabrera?

6 MR. HARVIS: Well, they first said, when I first
7 showed them this document they identified that this was a
8 document they had. Then I asked them to look at it and to say,
9 well, you told the DA that there were no results right so how
10 is that possible there are results here? They say, "I don't
11 know. I wouldn't have done that. I don't know the answer."
12 That was basically their response.

13 THE COURT: But they did not, the information that
14 comes up with regard to Mr. Cabrera's ownership of the vehicle
15 and registration of the vehicle, they did not at the deposition
16 say that they had that on the run at the time they ran it?

17 MR. HARVIS: Well, it's a little bit confusing, your
18 Honor, because what they say, what they began saying at the
19 deposition was they in fact conducted an additional check of
20 the vehicle at the time they saw it on the street from their
21 car, which is separate from the documents that we have, and
22 even though there was an order from Judge Francis for it to be
23 produced, we never received any documentation of that check.
24 The reason that's relevant, these are all just databases,
25 because if they actually queried the database as they said they

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1 did when they saw the car on the street, the results they would
2 have gotten back would have been the results in Exhibit 24
3 because those were the results at that time of that day.

4 THE COURT: Right. So this document indicates on 77
5 that on September 21 at 6:14:42 they sent a request.

6 MR. HARVIS: Correct, your Honor.

7 THE COURT: And three seconds later they got a
8 response.

9 MR. HARVIS: Exactly.

10 THE COURT: And your contention is that this is the
11 complete response that they received?

12 MR. HARVIS: That's what was provided in response to
13 the Court's order by the defendants, the City of New York, as
14 the response they received.

15 THE COURT: I know, but I'm trying to figure out what
16 you're going to prove at trial. You're going to proffer this
17 as the request that was made by the police officers and the
18 response that they necessarily would have received and that
19 response would have included information identifying
20 Mr. Cabrera as the registered owner of that vehicle.

21 MR. HARVIS: That is correct, your Honor.

22 THE COURT: All right. And what is the evidence going
23 to demonstrate at trial with regard to Bates stamp number 27?
24 Exhibit 16?

25 MR. HARVIS: Well, we hope that there is no trial

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1 because we're arguing for summary judgment, but we would hope
2 that, we would argue that the jury should draw the inference
3 that someone -- the only person who's testified to be involved
4 in this process is Officer Dennis -- either knowingly forwarded
5 information that was incomplete or actually altered the
6 document or its presentation so the district attorney would
7 have the impression that the data was not on file. And it's
8 even more consequential than that, because we have an affidavit
9 from the DA in which he testifies that Dennis actually told him
10 that the records were not on file and that's also contained in
11 the sworn criminal complaint that Dennis filed under penalty of
12 perjury.

13 THE COURT: And what makes you say that officer,
14 what's the name of the other officer?

15 MR. HARVIS: Caraballo.

16 THE COURT: What makes you say there's some evidence
17 he participated in?

18 MR. HARVIS: We cite the specific testimony in our
19 papers, your Honor, but he basically testified that he was
20 there for all the material parts of the process. He was there
21 not only when the arrest and the decision to arrest was made,
22 he authorized the arrest and he had continuing conversations
23 with Dennis about the fact he had run the results, that Dennis
24 had gone to the DA's office, they were both surprised the DA
25 decided not to prosecute the case.

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1 THE COURT: I know, but everything you just said still
2 doesn't give me a basis to say that he somehow should have
3 intervened. What information did he have that you say should
4 have prompted him to intervene?

5 MR. HARVIS: Oh, sure. Well, there is no credible
6 argument to be made that there was probable cause for the
7 charged offense here, which was criminal possession of a forged
8 instrument. Because assuming that that is a finding that is
9 made and there is no such credible evidence, then no reasonable
10 officer would have allowed that charge to have been provided to
11 the, commenced by the prosecutors and because Caraballo
12 understood that that was a charge that was being brought and
13 did not intercede and say, wait a minute, we don't have any
14 evidence to support that charge --

15 THE COURT: Well, that's only true if he knew that
16 the -- he knew what was on this radio run.

17 MR. HARVIS: No, I disagree, your Honor. This radio
18 run aside, this database aside, there is no actual evidence of
19 a forged instrument in this case. And so independent of this,
20 he --

21 THE COURT: If the officer says that I saw the
22 document, the document says that this car was registered, I ran
23 a database and this car did not come up registered, why
24 wouldn't that be a reasonable basis for the officer to conclude
25 that the temporary license plate was not a valid temporary

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1 license plate?

2 MR. HARVIS: If in fact this had come up as no
3 results?

4 THE COURT: Right.

5 MR. HARVIS: There is nothing in the record to suggest
6 that that ever happened.

7 THE COURT: There is something in the record
8 suggesting that. That's what the officer said. They swore on
9 oath that's what happened.

10 I'm trying to understand your argument that the
11 officer who ran the radio run, if he in fact cannot avoid the
12 fact that the radio run shows that Cabrera owned the
13 automobile, then I understand that it's your argument that that
14 means that one can conclude that he knew that this was not a
15 forged instrument because he knew that this car was validly
16 registered to this individual, but despite that he either
17 falsified the document and/or he swore in the complaint under
18 oath that he did a run and it didn't come up and that was a lie
19 because he did a run and it did come up. I understand that
20 part of the argument.

21 So I got a guy sitting next to him. I'm trying to
22 figure out what your theory is of the guy sitting next to him
23 and what is the evidence that the guy sitting next to him is
24 complicit in that fabrication.

25 MR. HARVIS: I completely understand your Honor's

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1 point and I think it's well taken. What I would say to that
2 is, the problem is that the officers were somewhat confused at
3 their deposition, so we just didn't get the clearest testimony.
4 I believe that the testimony will show that the sergeant puts
5 himself in all of these aspects of the investigation. He puts
6 himself there, reviewing these documents and sufficiently to
7 know that there's being a fabrication made.

8 THE COURT: I know, but did he ever say that he saw
9 the document that at the time and verified himself personally
10 that the car was not registered?

11 MR. HARVIS: I don't think it's clear enough from the
12 testimony for him to say that. It's a question of fact on that
13 point as to the second officer.

14 THE COURT: But what is the circumstantial evidence
15 that you intend to offer to demonstrate that he knew that and
16 he did something to aid and abet the fabrication of the other
17 officer?

18 MR. HARVIS: He says that he's with Dennis, comes back
19 to the precinct and sees Dennis doing the database checks, then
20 he has a discussion with Dennis and it would be our argument
21 that at that point obviously the results of the database check
22 would be discussed.

23 THE COURT: Right, and is there any reason to assume
24 that Dennis would not have said to him the same thing he said
25 to the DA?

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1 MR. HARVIS: Oh, I see. Well, I really don't -- I
2 don't know. He doesn't remember.

3 THE COURT: That's what I'm asking. You want to throw
4 him in the suit but just because he's next to him, the DA is
5 next to him, but if you say he's fabricating the document, I
6 mean, you're doing more than just saying he lied about it.
7 You're saying that he had a document and either altered it or
8 did something to make it incomplete when he, to support his
9 perjury that he ran it and it didn't exist. So the other
10 officer, I'm just trying to figure out whether he's just going
11 to say, well, wait a minute, that's not my affidavit, I didn't
12 say that, and I didn't do the radio run, he did the radio run.
13 I said to him, well, what's it say? He says it's not
14 registered. And then I say, well, then, arrest him.

15 MR. HARVIS: That wasn't his testimony at the
16 deposition. The testimony at the deposition was more
17 collaborative where they're working together on this process
18 where I think a reasonable inference could be drawn not
19 necessarily to grant us summary judgment as to these claims,
20 but at least a triable issue of fact as to whether he saw the
21 database version that's Exhibit 24 or he saw 16. That would be
22 my position.

23 THE COURT: But he never said, he was never asked nor
24 did he ever testify that he saw the database itself in whatever
25 form?

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1 MR. HARVIS: I honestly just don't remember that
2 question, your Honor. I'm not sure.

3 THE COURT: I mean that's -- all right. So, and then
4 I'll let you get to the argument and most of my questions are
5 probably going to be considered on each one of your claims, but
6 I'm not sure. You guys have this sort of a back and forth,
7 sort of past each other on your first claim of unlawful stop and
8 search and I don't even see a search. I don't understand what
9 that claim is.

10 MR. HARVIS: Sure. Well, the claim is basically, that
11 claim relates to the lawfulness of the officers going to the
12 house --

13 THE COURT: That's not a search, unlawful search.

14 MR. HARVIS: It's a seizure.

15 THE COURT: But he was under arrest, so how is that a
16 different claim? They went to the house and then they either,
17 you have a false arrest claim or you don't have a false arrest
18 claim. I don't understand what, how -- somehow I'm trying to
19 fashion that you're trying to say, well, between the time they
20 saw him at the door and he went downstairs and they put the
21 cuffs on him, you have a separate claim that's not part of the
22 false arrest claim. It's not a search claim because they
23 didn't search him.

24 MR. HARVIS: Right, I agree.

25 THE COURT: And that's what you argue it's some kind

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1 of a search claim.

2 MR. HARVIS: It's a Terry claim is really what it is.
3 It depends on how we analyze it.

4 THE COURT: It isn't, because he was either, he was
5 either under arrest or he wasn't, and it was clear that they,
6 you know, and whether they tricked him into coming out of the
7 house doesn't make it an unlawful stop claim. They came and
8 knocked on the door and they said would you come downstairs.
9 Quite frankly, as soon as he started going downstairs with them
10 he's under arrest, they're not letting him go. They know he's
11 not going anywhere. They took him downstairs to arrest him. I
12 don't know how that's a separate claim for this.

13 MR. HARVIS: Sure. The only way I would have thought,
14 in the situation where we all came to the conclusion that the
15 arrest was made downstairs, it just would be for him to be
16 compensated for the time from when they came to his door until
17 the time they made the arrest. Because they claim there was
18 some investigation they were purportedly doing before they came
19 to the door even though the plaintiff said there was basically
20 nothing said. So from the point they seized him and brought
21 him downstairs we want to be sure that the constitutionality of
22 that is considered.

23 THE COURT: The reason why I'm confused is because
24 your paragraph 32 that supports this claim said defendant
25 violated the Fourth and Fourteenth Amendment because they

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1 stopped and searched plaintiff without reasonable suspicion.

2 MR. HARVIS: Right.

3 THE COURT: That's not what happened.

4 MR. HARVIS: Not at that moment. He was searched at
5 the precinct obviously.

6 THE COURT: But at that point he's already under false
7 arrest. There's no search claim. You didn't say he was
8 stopped and detained. He wasn't even stopped. They came and
9 they knocked on the door.

10 MR. HARVIS: You're right.

11 THE COURT: So I'm just trying to figure out why, I
12 mean, I see, at least I see clearly your theory with regard to
13 a false arrest and malicious prosecution. That's basically the
14 heart of your claim.

15 MR. HARVIS: And evidence fabrication, your Honor.

16 THE COURT: They falsely arrested him and they knew,
17 because, and my version would be because they ran the database,
18 and the database indicates that he validly had a registered
19 car, that they clearly didn't have probable cause to arrest him
20 for a forged instrument because they had information in their
21 possession. I don't know, was he arrested before or after this
22 database was run?

23 MR. HARVIS: The one here, he's already been at the
24 precinct for a few minutes, but it's before any process is
25 issued to him. But they testify, your Honor -- I'm sorry to

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1 interrupt, but the officers themselves testify, as I mentioned,
2 they had actually run these database checks from their vehicle
3 before they went to his house.

4 THE COURT: So they saw the database but they didn't
5 print it out?

6 MR. HARVIS: Correct.

7 THE COURT: Then when they got to the precinct this is
8 the request to print it out?

9 MR. HARVIS: Right. Just with this caveat we have the
10 two versions of it, but yes.

11 THE COURT: Right it's two versions, but the times,
12 there's one run.

13 MR. HARVIS: Correct.

14 THE COURT: One isn't run at one time and the other is
15 run at a different time.

16 MR. HARVIS: That's exactly right, your Honor.

17 THE COURT: At the precinct at 6:19:43 they ran a
18 database. Now, whether this is the result, which one is the
19 result is the question.

20 MR. HARVIS: Exactly.

21 THE COURT: Well, let's make sure that's correct.

22 MR. HARVIS: I'll tell you again if you want to know
23 the Bates numbers to compare them.

24 THE COURT: Yeah. I thought they have different
25 times.

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1 MR. HARVIS: No, they don't actually, your Honor. If
2 you look again DEF 25 on Exhibit 16 gets compared to DEF 275 to
3 276 on Exhibit 24. And then it's exactly the same.

4 THE COURT: No, I have on 273, I have a different
5 time.

6 MR. HARVIS: Correct and the 273 time correlates to
7 the DEF 26. If you look at DEF 26 the only reason we don't
8 make note of that is, as I said, it makes note to an expired
9 plate, but if you look at 273 to 274 that's the same as DEF 26.

10 THE COURT: I see. So the relevant document is not
11 273.

12 MR. HARVIS: Correct.

13 THE COURT: The relevant document to be compared is
14 275.

15 MR. HARVIS: Correct.

16 THE COURT: Comparing that to --

17 MR. HARVIS: DEF 25.

18 THE COURT: 25. And you say that there's, no one has
19 an explanation as to why this information with regard to
20 Cabrera --

21 MR. HARVIS: Block 4, your Honor, yes.

22 THE COURT: Block 4, is not a part of the document
23 that was in the possession of the district attorney's office.

24 MR. HARVIS: That's correct and the document that was
25 argued before this Court in the initial motion practice.

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1 THE COURT: Did you have both of these documents when
2 you did the deposition?

3 MR. HARVIS: Yes.

4 THE COURT: And was the testimony there or evidence
5 from some other place that 25 was what was given to the
6 district attorney's office by Officer Dennis?

7 MR. HARVIS: Yes, your Honor. We have an affidavit
8 from the DA's office that references the specific documents and
9 shows that the ones that correlate to DEF 25 are the ones that
10 were sent them and no others.

11 THE COURT: And they did not receive 75?

12 MR. HARVIS: That's correct.

13 THE COURT: Okay. So you can establish that 25 was
14 what was provided by the officer to the district attorney's
15 office?

16 MR. HARVIS: That's correct.

17 THE COURT: It's not as if the district attorney's
18 office did their own independent run. They saw this
19 information from the arresting officer and the arresting
20 officer provided whatever information they had they contend
21 that was provided by the arresting officer.

22 MR. HARVIS: Yes, your Honor.

23 THE COURT: All right. Then I got it.

24 So, all right. So I understand, as I say, I have some
25 issues with Count One as being a separate count from Count Two.

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1 I understand, I assume that your position with regard to Count
2 Two, and I don't know if you have a different theory, but I
3 assume that your theory is that -- well, let me ask one more
4 question. Did they claim that they did the run before they
5 went up to the apartment or after they arrested the plaintiff?

6 MR. HARVIS: They claim before, your Honor, in their
7 deposition. We just haven't provided any documentation.

8 THE COURT: Okay. So the scenario that you say the
9 facts support is that the officers made their observations of
10 the different temporary plates on the car. To verify whether
11 or not this gentleman just had an unregistered car they ran the
12 plate? They ran what.

13 MR. HARVIS: They ran the VIN, your Honor, and I think
14 also the plates. They weren't sure if they just ran the VIN or
15 the plates, but both would have shown this registration was
16 valid.

17 THE COURT: The plates would have been the temporary
18 Virginia plates.

19 MR. HARVIS: It's interesting, the car had just days
20 earlier had just days earlier actually been registered in New
21 York, so if they ran the VIN it would have shown the
22 registration was active in New York and was also active on the
23 Virginia plates. They were all tied in to the car.

24 THE COURT: Is that on the document?

25 MR. HARVIS: Yes.

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1 THE COURT: Where is the Virginia plate?

2 MR. HARVIS: If you look at Exhibit 24, the first
3 document 273 to 274 is one of the Virginia plates. You see at
4 the top license and it says 39956K? That's one of the plates.

5 THE COURT: That says New York.

6 MR. HARVIS: Well, no, I think that that just shows
7 that it's first being checked in the New York system and then
8 when you go down to block four it's showing it responsive for
9 the Virginia out-of-state system.

10 THE COURT: Block 4?

11 MR. HARVIS: Exactly.

12 THE COURT: So this indicates that they ran, the
13 39956K is the Virginia current plate or expired plate?

14 MR. HARVIS: Current plate, your Honor.

15 THE COURT: So they ran that plate?

16 MR. HARVIS: Yes.

17 THE COURT: The 1002 is the VIN number?

18 MR. HARVIS: The VIN number is on page 274. It's the
19 top line of that page. It begins with WBA.

20 THE COURT: Okay. All right. So they ran --

21 MR. HARVIS: I'm sorry, your Honor. I misspoke. This
22 273, 274 is the expired plate, not the active one. You see it
23 there on block 4, it says plate status expired on page 274,
24 third line down.

25 THE COURT: So that's the expired plate that

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1 corresponds to the VIN number and that was the one that was in
2 the car window with the other plate?

3 MR. HARVIS: No. I believe that is the one on the
4 front and back in the car.

5 THE COURT: And then the valid plate.

6 MR. HARVIS: In the car window is the pages 2 and 3,
7 so it's pages 275 and 276 relate to the active plate and you
8 can see it again. It follows the same.

9 THE COURT: So the active plate would be LI4?

10 MR. HARVIS: That's correct, your Honor.

11 THE COURT: So that's the active plate.

12 MR. HARVIS: Actually, if you continue, your Honor,
13 into 277, that is then the check of the actual VIN and that
14 shows you that it's registered under New York State as an
15 active registration.

16 THE COURT: 277 is the VIN. The WBA?

17 MR. HARVIS: Yes.

18 THE COURT: And where does it say it's an active
19 plate?

20 MR. HARVIS: On page 278, it's in that block, that
21 same block at the top of 278. Let me just find, it says status
22 valid at the bottom of that block, it's the bottommost part of
23 that block.

24 THE COURT: Where it says valid; status valid?

25 MR. HARVIS: Correct.

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1 THE COURT: Except I don't understand the difference
2 between that block with Cabrera's name in it and block number 1
3 which says no record. Why would block number 1 say no record?

4 MR. HARVIS: I can only assume that that has to do
5 with some different aspect of the database that's being
6 queried. I think they looked through different repositories of
7 information when it's keyed in.

8 THE COURT: Because the first four blocks say no
9 record.

10 MR. HARVIS: That's correct.

11 THE COURT: And the fourth block shows the valid
12 number. So all of this would have come up on the run?

13 MR. HARVIS: Exactly. This is as it was done,
14 according to the City.

15 THE COURT: All right. Except I don't understand, it
16 says here, it says it's valid and it says that the expiration
17 date, I see, is 9/13/2007.

18 MR. HARVIS: That's correct, Judge.

19 THE COURT: And it was run on 9/21/2015. That was the
20 date of the arrest.

21 MR. HARVIS: Exactly.

22 THE COURT: All right. So the scenario as I have it,
23 if this case were to go to trial, what you say that the
24 evidence would show is that they arrested your client for
25 having a forged temporary license plate based upon the fact

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1 that they claim that the unusual circumstances of having the
2 expired plate and the new plate and the date of the new plate
3 being the date of the sale, so --

4 MR. HARVIS: When they go to the DA they say, because
5 the plates aren't on file, that's what they're hanging their
6 hat on, but at the deposition they say because the plate is
7 laminated and they're trying to say the dates are somehow
8 improper because the sale date of the second license plate is
9 the same as the expiration date of the first one. But if you
10 think about it if the plate is expiring, the original plate, it
11 might make sense the new plate issue date is the same as the
12 date of expiration.

13 THE COURT: But what's more important is that they ran
14 the VIN.

15 MR. HARVIS: That's our entire argument.

16 THE COURT: And they ran the plate, and the VIN,
17 running the VIN indicated from these records that both, it was
18 validly registered in New York and that the temporary plate was
19 a valid temporary plate.

20 MR. HARVIS: The only thing -- that's largely correct.
21 I just want to point out there needs to be two different
22 databases checked in order to get to that conclusion which both
23 of them were checked here. One is the out-of-state license
24 plate which shows valid for the out-of-state plate and VIN for
25 New York, which shows valid for a New York registered vehicle.

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1 THE COURT: So your position is they knew when they
2 did this run, and you say they indicated they did this run
3 before they even went up to his apartment.

4 MR. HARVIS: At their deposition, yes.

5 THE COURT: They knew when they went up to the
6 apartment they had in hand, well, not in hand, but they had
7 already checked the registration and that would have indicated
8 that the current temporary out-of-state registration was valid.

9 MR. HARVIS: Yes.

10 THE COURT: And they, even though he had not yet
11 received the plates themselves, he already, his car was
12 technically already registered in New York.

13 MR. HARVIS: That's correct.

14 THE COURT: So they would have known it. And in fact
15 my recollection is they basically said, testified, and their
16 testimony would be if they had known that, they would not have
17 arrested him.

18 MR. HARVIS: That's what Officer Dennis said in his
19 deposition, yes.

20 THE COURT: So if they knew this and they arrested him
21 anyway, reasonable argument that's a false arrest.

22 MR. HARVIS: I think so, your Honor.

23 THE COURT: If they knew this, and still filed a
24 false, swore to a false complaint indicating that, Dennis
25 indicating, quote, I ran a computer check of the license plate

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1 numbers which revealed that the numbers were not on file
2 anywhere," that that was a false sworn statement.

3 MR. HARVIS: That's correct, your Honor.

4 THE COURT: And so, therefore, not only was that in
5 support of the false arrest, it initiated a prosecution, where
6 he knew that those facts weren't true.

7 MR. HARVIS: Exactly.

8 THE COURT: And by providing this run which deleted
9 the specific information about Mr. Cabrera's information, he
10 fabricated the evidence?

11 MR. HARVIS: Yes. We believe fabrication is shown
12 both through his statements under the Garnett case, as well as
13 the actual documents, but the documents alone would suffice.

14 THE COURT: I'm not sure how his statements qualify as
15 a fabrication of evidence.

16 MR. HARVIS: Well, that's a matter of some dispute in
17 most Courts, but in the Garnett case Judge Woods stated it
18 would qualify as fabricated evidence, and it was upheld by the
19 Second Circuit. That case is Garnett.

20 THE COURT: What do you say is fabricated evidence?

21 MR. HARVIS: The statement the plates were not on file
22 anywhere because it's material to the charge Dennis was trying
23 to make out and it might be admissible against him in court as
24 well.

25 THE COURT: What might be admissible?

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1 MR. HARVIS: Dennis's allegation he did the search and
2 the plates were not on file.

3 THE COURT: Well, the testimony.

4 MR. HARVIS: Exactly.

5 THE COURT: I'm not sure --

6 MR. HARVIS: We don't really know --

7 THE COURT: That's not critical. I'd have to think
8 that out as to whether or not I would agree with Judge Woods
9 that that testimony in and of itself is fabrication of
10 evidence.

11 MR. HARVIS: Sure, but certainly the alteration of
12 these documents would qualify.

13 THE COURT: Clearly. I'm not sure that I have much,
14 if that is the scenario that can be proven, I'm not sure that I
15 have much of a dispute as to whether or not a jury could rely
16 on that for malice, a finding of malice. Obviously, if a
17 police officer knowingly and willfully arrests a person that he
18 knows is innocent, for whatever advantage he personally gains
19 from that, I think you could argue that it matters,
20 particularly in light of the fact that he has to go through the
21 lengths of deliberately perjuring himself in fabricating a
22 document, that he knows that the document is, has to be altered
23 and basically what he is doing is what he is accusing the
24 plaintiff of doing.

25 MR. HARVIS: It's almost worse, your Honor.

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1 THE COURT: He's forging a document minimally and with
2 regard to other violations of the law. I understand that. I'm
3 not, again, I just said, I have some issue with whether or not
4 there's a separate unlawful stop and search, as you've alleged
5 it, and I have some concern about your negligent hiring,
6 training, retention, because I don't know what, I can't clearly
7 articulate the facts and I'm not sure what facts you say that
8 would support the, they should have known better not to hire
9 him, they should have trained him to do something different.
10 It doesn't take a whole lot of training to tell an officer
11 you're not supposed to fabricate a document and you're not
12 supposed to give false testimony. I just don't --

13 MR. HARVIS: I realize also, I want to bring before
14 the Court, I realize there was a drafting error here. We did
15 not actually plead a state law malicious prosecution claim by
16 name here. I want to note to the extent we can make the
17 argument that the pleadings here can conform to the proof we
18 have the timely claim and that is valid under state law so to
19 the extent I want to put on the record I made a mistake there.

20 THE COURT: Which form?

21 MR. HARVIS: The claim for malicious prosecution it's
22 listed as a federal claim and there's an analogue claim that we
23 have a right to assert --

24 THE COURT: Well, quite frankly, I think the -- I'm
25 not even sure that the jury needs any separate instruction,

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1 substantive instruction with regard to the state and federal
2 false arrest claim and the state and federal malicious
3 prosecution.

4 MR. HARVIS: The only reason I'm mentioning, the only
5 material difference is under federal law you have to show a
6 post-arraignment deprivation of liberty and in the state law
7 it's not required and that's an argument the City is making,
8 but I just want to put it on the record. So I agree with your
9 Honor.

10 THE COURT: I'm not aware, I'm not particularly
11 compelled by the infliction of emotional distress. I'm not
12 sure that, that a false arrest itself is simply an outrageous
13 conduct that shocks the conscience, causes -- that he should
14 have known or intended to cause some serious emotional distress
15 by your client.

16 MR. HARVIS: I agree with your Honor and I think in
17 the run-of-the-mill case that would be true. I just point to
18 some of the egregious facts in the record here, including the
19 fact Mr. Cabrera was in his own home, never been arrested
20 before, was with his whole family and if the record supports
21 that the officers went there knowing he had done nothing wrong
22 and in front of his family being told he has an active warrant,
23 he's never been arrested, take him downstairs in his
24 neighborhood, arrest him and have all these false charges, I
25 think it raises a question of fact especially considering the

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1 ongoing nature of it. After they had arrested him, they had
2 the DAT, they go forward, bring these charges, he could have
3 gone to jail. Somebody like him could be seriously affected by
4 it, it could raise a triable issue, but I defer to your Honor
5 on that issue.

6 THE COURT: Again, I don't, with regard to the last
7 claim, the failure to intervene, I'm not sure that the -- I
8 mean, the you're either alleging that he should have intervened
9 and not let Officer Dennis make the arrest or intervene and not
10 let Officer Dennis swear to the complaint.

11 MR. HARVIS: If I could just respond to that, your
12 Honor. Think the issue here is a conceptual one. I don't
13 believe that this is appropriately a claim per se. I think
14 instead it is an affirmative duty that the officer has in all
15 circumstances. So it's not so much we're trying to suggest
16 there was some separation in terms of the direct involvement.
17 It's that what we're really trying to remind the Court is all
18 officers have this duty and if the jury were to conclude that
19 one of them was a direct participant and the other knew of it
20 but didn't do anything that could give rise to liability.

21 THE COURT: I just don't understand how they could
22 conclude that. I don't see how on these statistics they could
23 conclude anything other than the other officer is principally
24 responsible for this arrest and prosecution if the other
25 officer knew when they made the arrest that he shouldn't have

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1 been arrested and knew when they held him and submitted
2 evidence to the DA that he was going, that he was being
3 prosecuted unfairly. I mean, look, even, you say the other
4 officer was Dennis's supervisor?

5 MR. HARVIS: Yes.

6 THE COURT: Well, he had to have known that
7 particularly with regard to the malicious prosecution, he had
8 to have known, if he knew about the radio run, he would have to
9 know that he would have to, he was likely himself going to be a
10 witness in this prosecution, that he was not just a standby or
11 some sort of observer --

12 MR. HARVIS: Sure.

13 THE COURT: -- cop, with regards to finding out about
14 something and not doing anything about it. He was there as one
15 of the arresting officers and he knew that he was going to
16 likely be a witness and have to testify falsely against the
17 plaintiff if this case went to trial.

18 MR. HARVIS: I agree with that, your Honor.

19 THE COURT: Well, okay. So I guess we probably
20 covered most of it. Is there anything else that you wanted to
21 argue? I know the law on most of these issues.

22 MR. HARVIS: No, I can rest on our briefs, your Honor.

23 THE COURT: All right. Then let me hear from the City
24 with regard to these claims.

25 MR. JOHNSON: Good morning, your Honor.

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1 THE COURT: Good morning.

2 MR. JOHNSON: The undisputed facts here is that on
3 September 21, 2015, plaintiff's vehicle was parked at the
4 intersection of 168th Street and Convent Avenue.

5 THE COURT: Slow down.

6 MR. JOHNSON: The vehicle had license number 39956K
7 which is at DEF 71, had a expiration date of September 14,
8 2015.

9 THE COURT: Right.

10 MR. JOHNSON: Plaintiff subsequently produced the
11 temporary certificate of registration which shows the date of
12 sale --

13 THE COURT: Say that again? He subsequently produced?

14 MR. JOHNSON: The temporary certificate of
15 registration which proves he purchased the vehicle on
16 September 15.

17 THE COURT: But I thought there was something also on
18 the car that indicates.

19 MR. JOHNSON: Yes, I'll get to that. In his
20 deposition he purchased the vehicle on September 15, 2015,
21 that's the date of sale.

22 THE COURT: All right.

23 MR. JOHNSON: Officer Dennis seized the expired
24 plates, which is a violation of New York City traffic law where
25 you can't have plates that are expired on your vehicle.

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1 THE COURT: He saw more than the expired plates.

2 MR. JOHNSON: I'm getting --

3 THE COURT: I'm not sure I understand that theory.

4 You can have ten expired plates on your car as long as you have
5 a valid plate on your car.

6 MR. JOHNSON: They have to match information therein.

7 THE COURT: No, the valid plate has to match.

8 MR. JOHNSON: The plate that --

9 THE COURT: I can stick on my car somebody else's
10 temporary plate as long as I don't represent that to be the
11 thing that authorizes me to drive that car. I mean, if they
12 looked in the back seat and saw it sitting on the back seat,
13 that's not a violation as long as they see a valid plate.

14 MR. JOHNSON: The valid plate should be affixed in the
15 license plate holder.

16 THE COURT: It was here.

17 MR. JOHNSON: The expired plates were affixed to the
18 license plate holder. The valid one was on the dash. The
19 expired plates were on the license plate holder.

20 THE COURT: You don't claim there's anything illegal
21 about that?

22 MR. JOHNSON: No.

23 THE COURT: They claim that's not what they would have
24 arrested him for.

25 MR. JOHNSON: That just drew their attention because

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1 they see expired plates. He looks up and sees a third plate
2 with a different number, another temporary plate, and in his
3 training and experience you don't get temporary license plates
4 with different numbers on them.

5 THE COURT: I thought there were only two plates. You
6 say there was a third?

7 MR. JOHNSON: There's three plates. There's a third.
8 Two plates with the same number on the front and back on the
9 vehicle.

10 THE COURT: One is expired and one is valid.

11 MR. JOHNSON: Both expired on the front and back of
12 the vehicle.

13 THE COURT: Okay, so the two that match were the
14 expired?

15 MR. JOHNSON: Correct.

16 THE COURT: And they had different dates?

17 MR. JOHNSON: They had an expiration date of
18 September 14, 2015.

19 THE COURT: They had both the same date?

20 MR. JOHNSON: Both the same date.

21 THE COURT: How is that different?

22 MR. JOHNSON: Well, there's a third plate with
23 different numbers.

24 THE COURT: How is that a second plate?

25 MR. JOHNSON: It's not a second plate. It's just one

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1 set of plates.

2 THE COURT: So you say there are two different
3 documents?

4 MR. JOHNSON: Right.

5 THE COURT: And those two different documents are the
6 expired plate?

7 MR. JOHNSON: One is the expired plate and that's on
8 the license plate holder and the other one is the one that
9 purports to be a valid plate that's on --

10 THE COURT: But you just gave me three different--

11 MR. JOHNSON: There's three plates on the car, two
12 different numbers.

13 THE COURT: So the first two are just the same expired
14 plate.

15 MR. JOHNSON: Right.

16 THE COURT: So there's the documents indicating the
17 expired plate and there's documents indicating what purports to
18 be a valid temporary plate. The valid temporary plate has a
19 different license number.

20 MR. JOHNSON: Yes. And the only reason the expired
21 plates are important, because they expired on September 14,
22 2015, and then he sees a plate in the dashboard which is
23 laminated, and that plate has an expiration date of October 15,
24 2015, but it has a date of sale of September 14, 2015. So
25 that -- those undisputed facts draw the attention of the

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1 officers. First of all, the New York City Traffic Code is very
2 specific that you cannot cover a license played in any plastic
3 or synthetic material.

4 THE COURT: That wasn't their concern.

5 MR. JOHNSON: That wasn't their concern, but it was
6 not known to them at the time, but it is part of their concern
7 because it did draw their attention, because plates are not
8 supposed to be laminated.

9 THE COURT: So far so good. So far they're doing the
10 right thing.

11 MR. JOHNSON: So they see that and they testify that
12 they do a radio run and the plates come back with a New York
13 State license plate, that's what they get, and that New York
14 State license plate was not on the vehicle.

15 THE COURT: That's not what they say. They say -- I
16 thought they said that they ran it and it didn't -- there was
17 no information.

18 MR. JOHNSON: So -- no, that's not what they testify.
19 Here they testify in our 56.1 that there should have been New
20 York State plates on the vehicle because it came back as a New
21 York State registered car.

22 THE COURT: The VIN came back as a New York State
23 registered car.

24 MR. JOHNSON: Right, with a New York State plate, and
25 that plate was not on the car.

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1 THE COURT: And did that plate indicate that it was
2 Mr. Cabrera's car?

3 MR. JOHNSON: Yes.

4 THE COURT: So at that point on what basis did they
5 have to believe that he is driving an unregistered car?

6 MR. JOHNSON: What they don't -- it's not what they
7 think is an unregistered car. They're thinking that he's
8 displaying an improper plate as an attempt to deceive, for
9 whatever reason.

10 THE COURT: The only way you could deceive is to be
11 able to drive a car that's not registered.

12 MR. JOHNSON: It's not that --

13 THE COURT: What's the deception?

14 MR. JOHNSON: The deception is, it's not for the
15 purposes of -- it's so that someone didn't check the VIN number
16 and just wrote a parking ticket based on that license plate,
17 they wouldn't get the right car. Also, there are a variety of
18 reasons why there are --

19 THE COURT: I know, but they -- that doesn't, that in
20 and of itself doesn't make a whole lot of sense as being
21 probable cause for an arrest. It is clear that that is a
22 circumstance, regardless, if you put aside the date, it's clear
23 that if they confront a car that has a valid temporary -- it
24 would not be unusual to confront a car that has a valid
25 temporary out-of-state license plate, and when you run the VIN

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1 number the car would come up with a recently issued New York
2 State plate. Almost every car is in that situation. You have
3 your temporary plates if you bought the car in New Jersey until
4 you receive your permanent plates in the mail from the State of
5 New York. And, obviously, the VIN number in that plate is
6 going to come up even before you receive the plate in the mail.

7 MR. JOHNSON: That's not the case. When the VIN
8 number is registered, you're supposed to have the plates.

9 THE COURT: That's not true. When the VIN number is
10 registered, that means that they issued the plates. The plates
11 are put in the mail. As a matter of fact, the plates are
12 either mailed to you directly or they're mailed to the dealer.
13 If they're mailed to the dealer, if the dealer picks up the
14 phone, he calls and says, "Your plates are here," I have to
15 drive to Jersey to pick up the plates. On my way to Jersey if
16 I get stopped, the cops would look at my temporary plate,
17 Jersey plate, they would run the VIN number, the VIN number
18 would show that my car does have registered valid plates and if
19 the cop said to me, well, how come those registered valid
20 plates aren't on your car, I would say because I'm on my way to
21 the dealer to pick them up, I just got notified they're there.
22 And my temporary plate hasn't expired yet. So I'm not driving
23 around illegally. What I have the responsibility to do is pick
24 up those plates and put them on my car before my temporary
25 plates expire.

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1 So there's nothing illegal about -- I'm not deceiving
2 anybody, and there's no reason for the cops to assume that if
3 they see temporary license plates on the car and they run a VIN
4 number and the VIN number comes up, particularly if they come
5 up with recently issued New York plates, there's no reason for
6 the cop to conclude that I'm trying to deceive somebody by
7 driving around in a car that's not registered.

8 MR. JOHNSON: That's -- their testimony is that these
9 plates did not come back, the Virginia plates did not come back
10 as valid.

11 THE COURT: No, the Virginia plate did come back.

12 MR. JOHNSON: No, that's not their testimony.

13 THE COURT: He had a valid temporary Virginia plate.

14 MR. JOHNSON: That's not their testimony. Their
15 testimony is when they did the vehicle check it did not come
16 back as a valid plate.

17 THE COURT: Okay, well, I was confused, then. I
18 thought the evidence was, and I don't remember what was the
19 testimony, but I thought the evidence was that they were
20 concerned not because it didn't come back as a valid plate,
21 they were concerned because the valid plate was issued at a
22 time that didn't make sense, that the purchase of the car would
23 coincide with the issuance and expiration of that plate, but I
24 don't remember any testimony that they thought that that was an
25 invalid plate.

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1 MR. JOHNSON: That's their testimony, that the
2 defense -- that they ran the plates and they were not valid.

3 THE COURT: But that's not what this document says.

4 MR. JOHNSON: They don't say -- they didn't produce
5 that document.

6 THE COURT: All right. So I have -- let me just
7 accept the scenario you give me. So far so good. I understand
8 it, although a little different than I thought I understood it,
9 that you're saying the cops saw the car, they saw an expired
10 temporary license plate number and they saw an unexpired
11 temporary license plate, both from Virginia.

12 MR. JOHNSON: Mm-hmm.

13 THE COURT: They ran both the plate and the VIN
14 number. When they ran the plate and the VIN number, the
15 current Virginia temporary plate did not come up.

16 MR. JOHNSON: Right.

17 THE COURT: And it did not indicate that the car was
18 even registered, had been registered in New York?

19 MR. JOHNSON: That it was never registered in
20 Virginia, that the plates were not valid, as he said.

21 THE COURT: What about New York?

22 MR. JOHNSON: He said they had a New York
23 registration, but those plates weren't on the vehicle.

24 THE COURT: Okay. So that's what I'm trying to
25 understand. He's saying that when they ran it, it came up as a

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1 New York registered plate?

2 MR. JOHNSON: Right, and that the Virginia plates did
3 not come up.

4 THE COURT: Okay. And that is not what's reflected in
5 Exhibit 24. Right?

6 MR. JOHNSON: Exhibit 24 is the one that says the
7 plates are not --no results. I'm sorry, that's not Exhibit 24,
8 I'm sorry, it's the other exhibit.

9 THE COURT: I'm trying to keep it straight. Exhibit
10 24 indicates that there was both a, the car was registered in
11 New York and that it had a valid Virginia temporary plate.

12 MR. JOHNSON: Well, there's no testimony to support
13 that assertion. That's --

14 THE COURT: I'm not talking about the testimony. I
15 mean, is that what the document says?

16 MR. JOHNSON: I mean, I don't know, I don't really
17 have anyone who can explain those documents, or who can testify
18 to what they say other than what the lawyers say they say.

19 THE COURT: Well, you have the cops.

20 MR. JOHNSON: Yes, and they -- at their deposition
21 they said that's not what the results said.

22 THE COURT: I know, but what -- did they say that
23 that's what's reflected in Exhibit 24, or what they testified
24 to is reflected in Exhibit 24?

25 MR. JOHNSON: What they said -- I'm sorry. What they

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1 testified to was that they had never seen these documents
2 before.

3 THE COURT: I know. Forget about whether they've seen
4 it before. What does it reflect? Does this document reflect
5 that there was a valid New York plate and a valid temporary
6 Virginia plate?

7 MR. JOHNSON: I believe so, but I don't know, because
8 they're not sure what this document is.

9 THE COURT: Well, what makes you believe so?

10 MR. JOHNSON: I don't know, because I don't really
11 know, because the testimony is a little bit fuzzy --

12 THE COURT: I know, but you said you believe so. Let
13 me put it aside and give it back to Mr. Harvis. Mr. Harvis, is
14 this clear to you?

15 MR. HARVIS: Yes, your Honor, it's as clear as day and
16 testified to by the City of New York.

17 THE COURT: Where does this document indicate there
18 was a valid current Virginia plate?

19 MR. HARVIS: Sure, that's on page 276. Plate status
20 active. It's the third line down from the top of 276 on the
21 end.

22 THE COURT: Third line down? Status active. And
23 where is it --

24 MR. HARVIS: That's the plate status for the Virginia
25 plate.

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1 THE COURT: How do you know that's for the Virginia
2 plate?

3 MR. HARVIS: Because at the beginning of that on page
4 275 is an inquiry of that license plate number.

5 THE COURT: Which is?

6 MR. HARVIS: L14001.

7 THE COURT: All right.

8 MR. HARVIS: If I may, your Honor, I'll tell you about
9 the VIN, but --

10 THE COURT: All right. So this document indicates
11 that there was both a -- this car was both registered in New
12 York and had temporary registrations for Virginia?

13 MR. HARVIS: That were valid. Yes, your Honor.

14 THE COURT: So whatever they would have run, this is
15 the information that should have come up?

16 MR. HARVIS: According to the NYPD and the City of New
17 York, yes.

18 THE COURT: So let me go back to Mr. Johnson. That's
19 what I'm trying to understand.

20 MR. JOHNSON: Yes.

21 THE COURT: So they did do this wrong.

22 MR. JOHNSON: They did and the documents they got are
23 the ones that were produced. The documents they saw were the
24 first set of documents, not Exhibit 24.

25 THE COURT: So where does Exhibit 24 come from?

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1 MR. JOHNSON: I have no idea.

2 THE COURT: Where did you get it from?

3 MR. JOHNSON: I got it from the NYPD.

4 THE COURT: All right. And you got it by requesting
5 what?

6 MR. JOHNSON: I requested any log-in information for
7 that day regarding Mr. Cabrera.

8 THE COURT: Okay. So if you hadn't seen the other
9 document, you'd be fairly confident to say this was the run
10 that was done that day and this was the information that should
11 have come up.

12 MR. JOHNSON: Say that again, your Honor? I'm sorry.

13 THE COURT: I'm saying if you hadn't seen the other
14 document, Exhibit 16, you would be fairly confident to say that
15 this was the run that was done on that date and this is the
16 information that should have come up.

17 MR. JOHNSON: I believe that's what -- yes.

18 THE COURT: And this was produced to you as the run
19 that was done on that day and the response that was received.

20 MR. JOHNSON: Well, yes. I don't know exactly what
21 the difference is between those.

22 THE COURT: Well, we do know what the difference is.
23 The difference is one shows --

24 MR. JOHNSON: I don't know why on the day they ran the
25 run they produced 16 and then 24.

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1 THE COURT: So where did you get 16? From the DA's
2 office?

3 MR. JOHNSON: Yes.

4 THE COURT: So this is the document they presented to
5 the DA's office.

6 MR. JOHNSON: Yes.

7 THE COURT: So let me ask you the tough question,
8 which I'm sure you don't have the answer to. How do you
9 explain that the document that they gave to the District
10 Attorney's office is missing what is the critical information
11 that is reflected in the document that was produced to you as
12 being represented to be the run that was done on that date in
13 the information that would have been received?

14 MR. JOHNSON: I don't have an answer other than
15 Officer Dennis says that's not the document he produced on that
16 date.

17 THE COURT: Okay. So is it your understanding that
18 the Police Department got this from the officers, or is it your
19 understanding that the Police Department did their own run?

20 MR. JOHNSON: I actually don't know the answer to that
21 question.

22 THE COURT: All right. And did you receive from the
23 police officers any documents that they had in their possession
24 with regard to the radio run?

25 MR. JOHNSON: Yes, and those were produced.

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1 THE COURT: And they produced what?

2 MR. JOHNSON: Exhibit 16.

3 THE COURT: They produced Exhibit 16. So what came
4 from the DA's office?

5 MR. JOHNSON: 24 also has the numbers that the DA got,
6 which was 24.

7 MR. HARVIS: No. It's 16.

8 THE COURT: 16 isn't missing information.

9 MR. JOHNSON: Yes, yes.

10 THE COURT: So you would agree that if the jury were
11 to conclude that the officers had this radio run and provided
12 information that deleted this information -- and provided the
13 document that deleted this information to the DA's office and
14 then swore to the DA's office that a computer check of the
15 license plate revealed that the numbers were not on file
16 anyway, you would agree that a reasonable jury might conclude
17 that this was a false arrest and malicious prosecution?

18 MR. JOHNSON: Well, I mean, first, I think you have to
19 address the Devenpeck issue --

20 THE COURT: The what?

21 MR. JOHNSON: The Devenpeck issue before we get to --

22 THE COURT: I'm sorry, I didn't hear you.

23 MR. JOHNSON: The Devenpeck issue, before we get to a
24 false arrest. Because you still have the violation of the New
25 York City Traffic Code which repeatedly even in the law itself

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1 says a violation of the New York City Traffic Code is --

2 THE COURT: But they testified that not only they did
3 not arrest him for that, they would not have arrested him for
4 that.

5 MR. JOHNSON: Only one of the officers testified to
6 that.

7 THE COURT: The other officer said he would arrest him
8 for that?

9 MR. JOHNSON: Yes, but also --

10 THE COURT: Wait, he said they would arrest him for
11 what? The lamination? Is that the argument you would make
12 before the jury they would justify this because they were
13 laminated?

14 MR. JOHNSON: The argument was not that he would make
15 that arrest, but based on that information and based on the
16 Supreme Court ruling in Devenpeck that if there was probable
17 cause for any charge even the ones that were not charged also
18 has --

19 THE COURT: So you say even though the officer said
20 under oath that they had no intent to arrest him for such a
21 violation, nor would they have arrested him for such a
22 violation, that that provides probable cause for a false arrest
23 if they falsified the document to simply arrest him for
24 something he didn't do? I would say that's a unique set of
25 circumstances, but it's not a hard argument to make.

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1 MR. JOHNSON: But that's why you can't have a false
2 arrest claim. A false arrest claim is based on was there any
3 evidence known to the officers that if they would have given
4 him a traffic ticket, that would provide probable cause for the
5 arrest.

6 THE COURT: Okay, but I'm not sure -- you guys debate
7 this and I'm not sure I agree with you on this point. Would it
8 be your position that if the car was parked beside an expired
9 meter that that would be, and they arrested him for being the
10 murderer of Jimmy Hoffa, that you could justify that false
11 arrest by saying they could have arrested him because he was
12 parked by an expired meter?

13 MR. JOHNSON: The facts in Devenpeck are somewhat
14 similar to those facts, where the man was arrested for murder
15 but there was another charge, wholly unrelated.

16 THE COURT: Yeah, but it was a charge that they could
17 have and would have arrested him for.

18 MR. JOHNSON: Repeatedly in the circuit, a traffic
19 violation, even a busted taillight, is probable cause. If you
20 look at Calais v. City of New York, Judge McMahon said an
21 arrest could stem from a violation of a busted tail light. New
22 York State Traffic Code specifically says a violation of New
23 York State Traffic Code would provide probable cause for arrest
24 on a warrant.

25 THE COURT: I have to look at that from -- this is a

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1 unique circumstance and I don't know if Judge McMahon was
2 trying to give as sweeping a pronouncement as you're trying to
3 argue from that. But it seems to me that you're in a different
4 situation if -- if I'm supposed to analyze what a reasonable
5 officer would have done having the same information, I could
6 only conclude that a reasonable officer, having the same
7 information that you just proffered to me would not have made
8 an arrest, and would not have argued that that would have been
9 a basis for me to arrest him. And, in fact, in this case the
10 officer himself, as you said, it would not have been a basis
11 for me to arrest this person. I arrested this person for
12 forging a document in order to deceive someone. You know?

13 I don't think that the Court says that, you know, in
14 hindsight you can just find some minor violation of the law
15 that no one ever thought about at the time to try to say that,
16 okay, even though it was a -- I arrested you for something I
17 knew you didn't do, that I'm immune from that because I found
18 out that, I saw that, you know, when I think back on it, I saw
19 that you were parked next to the meter and the meter had
20 expired, so I probably legally could have arrested you for
21 that.

22 I'm not sure, one, they could have arrested him for
23 that, because that's not a crime. And, two, that's not what
24 that reasonable officer or any reasonable officer would have
25 done. Is it your position that some reasonable officer out

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1 there in the world would have arrested this plaintiff because
2 he laminated the temporary license plate?

3 MR. JOHNSON: Well, under the Supreme Court ruling in
4 White v. Pauley, the question has to be beyond debate.

5 THE COURT: It's pretty much beyond debate. This
6 officer said he wouldn't do it. I don't know of any officer
7 who has ever done it. I don't think you're arguing that that
8 would have been a reasonable thing for them to do.

9 MR. JOHNSON: Again, you know, if other Courts have
10 said a minor traffic violation is a probable cause for arrest,
11 I don't know how, which minor traffic violations rise to the
12 level that no one ever gets arrested for.

13 THE COURT: The ones that should rise to the level are
14 crimes for which one can be arrested.

15 MR. JOHNSON: And the case law is very clear that
16 those minor traffic crimes, not just --

17 THE COURT: So what is it that you claim that the
18 plaintiff could have been arrested for?

19 MR. JOHNSON: So he could have been arrested for,
20 first, the plates being laminated, altered --

21 THE COURT: The plates? In what way were the plates
22 themselves altered?

23 MR. JOHNSON: They were laminated.

24 THE COURT: Okay. So the substance of the plates
25 weren't altered. Is there any --

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1 MR. JOHNSON: There's testimony that that could
2 obscure any possible security features on the --

3 THE COURT: What security features?

4 MR. JOHNSON: You can't tell.

5 THE COURT: Were there any security features?

6 MR. JOHNSON: He doesn't know, but if he --

7 THE COURT: Then how can he say it's probable cause if
8 he doesn't know whether --

9 MR. JOHNSON: He testified that he expects to see
10 security features.

11 THE COURT: So what crime is that?

12 MR. JOHNSON: That is altering an official document.

13 THE COURT: What is the penalty for that? Loss of
14 liberty? Because unless you could argue that there was
15 probable cause to arrest him for a crime for which he can lose
16 his liberty, I'm not sure how you can justify it based on
17 probable cause to make an arrest. An arrest is the seizure of
18 a person. You can't seize a person and arrest them for a crime
19 for which they can't do time.

20 MR. JOHNSON: In Marshal v. City of New York -- that
21 argument is not in the Southern District. In Marshal they
22 argue that, you know, an officer can initiate an investigative
23 stop or arrest based on a violation of the traffic law. It
24 doesn't make any reference whether or not it has to be
25 imprisoned or not.

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1 THE COURT: Remind me what the traffic violation was
2 in that?

3 MR. JOHNSON: There are several of them.

4 THE COURT: Well, that makes sense. I mean, that's
5 not this case. You think the Court is saying that you could
6 justify a false arrest that is fabricated by officers based on
7 finding some minor traffic violation for which the officers
8 would not have arrested him and use that as the probable cause
9 for arresting him?

10 MR. JOHNSON: Because it was information that was
11 available to the officer at the time.

12 THE COURT: Right. Information available to the
13 officer at the time would not have resulted in an arrest,
14 right?

15 MR. JOHNSON: That's because it's a lesser -- he would
16 have just towed the car.

17 THE COURT: How would he have towed the car?

18 MR. JOHNSON: Because the license plates didn't show
19 up as valid. He could have towed the car as well.

20 THE COURT: No, no, no, no, no, no, no. They didn't
21 have grounds to arrest him for having an invalid license.
22 That's not what it was. You're not arguing that. That's the
23 issue for the case. You're arguing that they could have
24 arrested him because he laminated the temporary license plate.

25 MR. JOHNSON: Right, because it's a violation of the

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1 New York State Traffic Law.

2 THE COURT: What's the penalty for that?

3 MR. JOHNSON: It could be a fine, or it could be, any
4 violation of New York Traffic Law could be a fine and I believe
5 imprisonment up to 30 days.

6 THE COURT: I'm not sure that's true. It's not a
7 moving violation. First of all, it's not a moving violation,
8 and, second of all, it's not an unspecified misdemeanor, is it?

9 MR. JOHNSON: I'm sorry?

10 THE COURT: It's not an unspecified misdemeanor. It
11 may be some sort of illegality that warrants a fine, but on
12 what basis -- again, I don't know on what basis you say that he
13 could have done time for the lamination.

14 MR. JOHNSON: Also the dates on the license plates as
15 well. That's the second part of the analysis that they saw at
16 the time.

17 THE COURT: What crime is that?

18 MR. JOHNSON: It suggests that the plates were, even
19 if assuming arguendo that the plates are registered in Virginia
20 why is the date of sale equal to the expiration date on --

21 THE COURT: So what crime is that?

22 MR. JOHNSON: That suggests the plate is forged,
23 possession of forged instrument.

24 THE COURT: No, that's the crime for which he was
25 already arrested.

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1 MR. JOHNSON: That gets you to further probable cause.

2 THE COURT: Wait a minute. If I understand what
3 you're saying, and I definitely can't accept that and I can
4 reject that out of hand. You cannot say to me that having a
5 valid temporary plate but at the same time not removing the
6 expired temporary plate gives them probable cause to arrest
7 him.

8 MR. JOHNSON: The expired temporary date has an
9 expiration date of 9/14/15. The date of sale on the license
10 plate that was visible to the officer at the time is 9/14/2015.

11 THE COURT: But the current plate didn't expire until
12 when?

13 MR. JOHNSON: Why is the date of sale the same date
14 to --

15 THE COURT: That may be a good question, but it
16 doesn't make it probable cause.

17 MR. JOHNSON: But it's a reasonable basis to believe
18 these numbers are --

19 THE COURT: Not if I have a valid temporary plate in
20 the window.

21 MR. JOHNSON: How do you know it's validly obtained?

22 THE COURT: How do you know it's not?

23 MR. JOHNSON: Because the expiration date and the date
24 of sale match.

25 THE COURT: So?

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1 MR. JOHNSON: That suggests, why would they match?
2 They shouldn't match.

3 THE COURT: You say that's probable cause to arrest
4 me?

5 MR. JOHNSON: If he didn't have the expiration date of
6 9/15, and he just had this plate, right? Then they would have
7 no idea when the car was actually purchased. But this plate
8 makes it clear the car was purchased -- was not purchased on
9 September 14, 2015.

10 THE COURT: Okay. So, isn't it possible, not just
11 possible, isn't that in fact what happened, but isn't it
12 possible that if I buy a car in Virginia and the temporary
13 plates are going to expire, that the dealer may issue me a
14 temporary plate and may or may not issue me the temporary plate
15 with the same number, a second temporary plate?

16 MR. JOHNSON: That's not what Officer Dennis
17 testified.

18 THE COURT: That raised his suspicion, but that's not
19 impossible.

20 MR. JOHNSON: But it also raises suspicion.

21 THE COURT: But that doesn't make me a criminal.

22 MR. JOHNSON: No, it doesn't.

23 THE COURT: Look, I mean, let's be realistic about it.
24 You cannot tell me that if the only thing at issue here was
25 that they saw the temporary plate not match the date, but in

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1 fact they checked it and it turned out to be a valid temporary
2 license and it turned out that the car had been recently
3 registered permanently in New York, you can't argue to me that
4 I would have probable cause to come knock on your door and
5 arrest you, right? You're not arguing that, I hope.

6 MR. JOHNSON: No, but I am arguing that, A, that's not
7 what came back, and, B --

8 THE COURT: But if that's not what came back, that's
9 not your argument that they had another ground to arrest him.
10 That's your argument that they had an invalid ground to arrest
11 you because I agree with you. If they ran the plate and the
12 plate came back not registered in Virginia temporarily and not
13 registered in New York recently, I agree with you that they may
14 have at least a reasonable suspicion if not probable cause to
15 arrest me for not having available some evidence that my car is
16 validly on the street.

17 But that's a different question. But the question is,
18 if it turns out that the officers did this radio run and
19 verified that in fact the temporary license plate was valid and
20 the car was registered in New York, is there any argument you
21 could make that they had a basis at that point to arrest the
22 plaintiff?

23 MR. JOHNSON: I'm just saying yes because the other
24 violations of the --

25 THE COURT: Again, what's the other violation? You

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1 said it was a forged instrument because it wasn't registered.

2 MR. JOHNSON: Also, the New York State Traffic Law
3 says you can't park a car on the New York State public roadways
4 that's registered in New York without having New York State
5 plates on them.

6 THE COURT: Wait a minute. That's not true.

7 MR. JOHNSON: That's the exact law.

8 THE COURT: Are you telling me if I bought a car in
9 Virginia and I'm waiting for the New York plate, that I'm
10 illegally parked on the street until I get those plates and the
11 cops can arrest me?

12 MR. JOHNSON: That's exactly right. If he was parked
13 in a driveway, then there would be no issue.

14 THE COURT: Wait a minute. That's impossible. That's
15 not even -- no. The law doesn't say that. The law doesn't say
16 that. You're saying -- the point of the temporary plate is so
17 that I can drive the car and park the car on the street without
18 violating any law.

19 MR. JOHNSON: That's if you have -- but once you have
20 a New York State registration, you have to have the New York
21 State plate.

22 THE COURT: He doesn't have the New York State
23 registration, it hasn't come to him yet.

24 MR. JOHNSON: Then he can't park on a public roadway.

25 THE COURT: Think about what you're arguing.

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1 MR. JOHNSON: The plates were bought on September 14,
2 he could have them Fed Ex'ed.

3 THE COURT: So if I call the DMV and I say, you know
4 what? Mr. Johnson just told me I can't park my car on the
5 street today because I hear that you've already issued me my
6 New York license plate but I haven't received it and they say
7 well, we just mailed it yesterday.

8 MR. JOHNSON: They would tell you to come down --

9 THE COURT: -- I'm running the risk of some cop
10 walking up to me saying, "Where's your New York plates?" And
11 if I say, "The plates are in the mail," they say, "You're under
12 arrest and I'm towing your car away."

13 You're saying that's possible?

14 MR. JOHNSON: You can go to the DMV. They could give
15 you plates at the New York Department of Motor Vehicles if you
16 need license plates.

17 THE COURT: I'm not even sure what law you're
18 referring to. Where does it say you can't park the car on the
19 street with temporary license plates?

20 MR. JOHNSON: New York State Vehicle and Traffic Law,
21 402.1A states that vehicles registered in New York that are
22 parked on a public roadway -- this is the important part --
23 shall display a set number of plates issued by the Commissioner
24 with a number and other identification number corresponding to
25 a certificate of registration.

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1 THE COURT: And you say that that means that I can't
2 park, if I have temporary plates I can't park on the street
3 until I receive the New York plates.

4 MR. JOHNSON: Right, because those New York plates
5 will be available immediately to you.

6 THE COURT: But they're never available immediately.

7 MR. JOHNSON: You can go to the DMV and get your
8 plates right away.

9 THE COURT: I have to drive in and park on the street.
10 You're saying I can get arrested and my car could be towed if I
11 went to the DMV and parked to get my plates?

12 MR. JOHNSON: I think there are two things we're
13 confusing here.

14 THE COURT: I am confused.

15 MR. JOHNSON: One is whether or not you can get
16 arrested for having an invalid temporary place as a policy
17 issue and, B, whether it's a constitutional issue, whether or
18 not under the established law of the Supreme Court of the
19 United States a traffic violation provides probable cause for
20 arrest.

21 THE COURT: Well, you have two arguments that you made
22 that have two difficulties. One is that, no, your reading of
23 that statute does not mean and it cannot mean and no Court will
24 rule, even in traffic court, that that means that you can
25 arrest me for parking my car on the street because I only have

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1 my temporary license plate and I have yet to receive my
2 permanent plate. As a matter of fact, I hate to confess it,
3 but I committed a crime probably six months ago because I
4 bought a car in, Jersey they gave me temporary plates, the
5 temporary plates were on my car for a week before I got -- the
6 DMV said they were mailing me the plates. And I'm driving
7 around the City and I'm parking on the street and I don't have
8 New York plates, but I know my car is registered because I
9 didn't leave the dealership until I made sure they registered
10 my car. But they gave me temporary plates and they said you
11 know what you better do, you better make sure you get your
12 plates before these temporary plates expire and if you don't
13 get the plates before the temporary plates expire we will issue
14 you another set of temporary plates because it's not your fault
15 and that's the way the world works.

16 The way you just described the world is a Bizarro
17 world. That's not the way the world works. Nobody gets
18 arrested for parking on the street and no cop could reasonably
19 stand before a jury or a judge and say even though I falsified
20 documents to arrest this person for a crime they didn't commit
21 my defense is they had the car parked on the street with a
22 temporary plate and so they violated the law that says that
23 you're not supposed to park on the street unless you have your
24 plates displayed and they didn't have the plates displayed so
25 that excuses my willful framing this individual for a crime

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1 that he didn't commit. That really can't be your argument.

2 MR. JOHNSON: What the defendants argue is that the
3 plates did not come back as valid.

4 THE COURT: Yeah, but that is not an exception to the
5 rule. That is the rule. If that's the case, then your guys
6 have probable cause. I don't disagree with that. Your guys
7 have probable cause. What's at issue is the crime for which he
8 was arrested. Because these officers did not testify that they
9 arrested him for any other crime, they had any other
10 information that they thought was an arrestable offense and the
11 argument that you're making, my guess is that they would say
12 one of two things, and one thing they've always said, they said
13 I would not have made an arrest for that, and the second thing
14 they probably would say if they're asked under oath, do you
15 believe that any reasonable police officer would arrest
16 somebody for that? And they would say no.

17 So for you as lawyer talk could say to me that somehow
18 they had probable cause to arrest this guy because he didn't
19 have his New York permanent plates on his car because he hadn't
20 received them yet from the DMV, that that excuses their framing
21 this guy for a criminal offense that he didn't commit. I don't
22 think that that's what Judge McMahon meant. I don't think
23 that's what the Second Circuit meant, and surely if that's what
24 they meant, I don't think they meant in it this context and if
25 they were hearing what you're here saying, they would say, no,

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1 that's not what I meant.

2 So, no, I can't accept. I can accept your argument
3 that you're going to demonstrate -- it seems to me that if
4 you're going to demonstrate that these, that the critical issue
5 here is that these officers are going to say we arrested this
6 guy because we had information about one single crime that we
7 thought he was he was committing and we thought he was forging
8 a license -- and, remember, the forgery has to be with the
9 intent to defraud, deceive and injure another person. That's
10 what he was charged with. So you would have to say that they
11 had some information, not just that he had something that
12 wasn't correct, but he was doing it to defraud somebody or to
13 deceive somebody.

14 There's no basis here to believe if they know that he
15 has a valid temporary plate and they know that he's already
16 been issued a New York plate recently and that New York plate
17 and the temporary plate is still valid, there is no argument
18 for them to make that they had probable cause to believe that
19 because he had a temporary plate in the window he was trying to
20 deceive somebody. There's nothing to deceive anybody about.
21 He already has valid plates issued in New York. What would be
22 the deception? What would be the advantage that he's gaining
23 over anybody? The only advantage he's gaining is the advantage
24 that anybody gets lawfully, is that they can drive around in
25 their car with the temporary plates as long as they're current

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1 until they get their permanent plates. That's not, that in
2 itself is not a basis to deceive.

3 They arrested this guy because they believed that
4 these temporary plates did not give him the right to drive this
5 car on the road. And if they knew that he had -- and I assume
6 that that's their testimony or would be their testimony, that,
7 look, if they had seen this radio run, based on this radio run
8 they would not have gone to his house to arrest him. Under no
9 circumstances would they have gone to his house to arrest him
10 if they had this in hand. And the plaintiff claims that they
11 did have this in hand. So it's a factual dispute, not a legal
12 dispute as to whether or not that they falsely arrested him or
13 maliciously prosecuted him.

14 You would agree that if they knew that he had a
15 current Virginia temporary plate, and had already been -- and
16 DMV indicated he had already been issued his permanent plate,
17 that if they said that they had -- and they knew that
18 information, but they pretended like they didn't know that
19 information, to go to his house and arrest him and they
20 falsified the information and swore to the DA that he didn't
21 have such, that that wasn't the case, you would agree that that
22 would be a basis for a false arrest and a malicious
23 prosecution, wouldn't you?

24 MR. JOHNSON: As long as, only if you say that a
25 violation of traffic law does not give you probable cause to

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1 arrest.

2 THE COURT: All right, and you say the traffic law is
3 that he laminated the temporary plate and he parked his car on
4 the street.

5 MR. JOHNSON: Yes.

6 THE COURT: Those are the crimes that you say he could
7 have been arrested for?

8 MR. JOHNSON: That. Also that is altering an official
9 document, but yes.

10 THE COURT: How did he alter the document?

11 MR. JOHNSON: By laminating it. That changes the
12 texture. You can't laminate your Social Security card, for
13 example. You have to send the original, not a laminated
14 version of it.

15 THE COURT: I'm not sure that's technically correct.
16 You can laminate a copy of your Social Security card.

17 MR. JOHNSON: You can, but that won't be your
18 official.

19 THE COURT: Right. If somebody says, no, I want an
20 unlaminated official one, that's the one thing. But what is it
21 that you say that the evidence shows that was material, was a
22 material alteration of his temporary plate? What was the
23 material alteration?

24 MR. JOHNSON: That and the date of sale, because that
25 date of sale doesn't make any sense next to the expired date.

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1 THE COURT: The date of sale is not a crime.

2 MR. JOHNSON: No, but it suggests something is wrong
3 with the license plate.

4 THE COURT: I'm trying to figure out what crime
5 they're saying they had probable cause to arrest him.

6 MR. JOHNSON: That's where possession of the forged
7 instrument comes from, partially because of the dates on the
8 two license plates.

9 THE COURT: No, it doesn't come from them. They did
10 not have probable cause to arrest him until they verified when
11 they did the run that his car wasn't registered. If they did
12 the run and it showed that the car was registered, you would
13 agree they didn't have probable cause to arrest him for that
14 crime.

15 MR. JOHNSON: Yes.

16 THE COURT: So your argument is that they would have
17 had probable cause to arrest him for parking on the street?

18 MR. JOHNSON: Not parking on the street. For altering
19 an official document.

20 THE COURT: Okay, well, you gave that parking on the
21 street argument.

22 MR. JOHNSON: No, I understand.

23 THE COURT: I just can't buy that. You're saying for
24 laminating the temporary plate. And that prevented them from
25 doing what?

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1 MR. JOHNSON: Checking his veracity.

2 THE COURT: How?

3 MR. JOHNSON: Because they couldn't see whether or not
4 it's supposed to have any security features, because it's not
5 the original document.

6 THE COURT: I know, but they ran it. The ran the VIN.
7 Now, if you say to me they ran the VIN -- see, you can't ignore
8 that they ran the VIN. They ran the VIN. Now, if they're
9 right, when they ran the VIN that license plate didn't come up
10 as valid, but you would agree if they ran that VIN and they got
11 this document, that they didn't have probable cause. Because
12 it didn't stop them from verifying whether or not there was a
13 valid temporary plate. It was a valid temporary plate and they
14 also, it was registered in New York.

15 MR. JOHNSON: So their assertion obviously is it
16 wasn't a valid registered plate.

17 THE COURT: But that's not your alternative argument
18 to -- if a jury were to find that they ran the plate and the
19 VIN number, and they came up with a valid -- if they came up
20 with this document that indicates a valid New York State plate
21 had been issued and that -- come on in.

22 I'm supposed to have lunch with some folks and I
23 didn't know lunch was this early. Okay. I'll let you break my
24 rule, since I invited you. You can start eating and we'll be
25 finished up in a second.

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1 So I'm just trying to figure out what your exception
2 is that if they ran the VIN, they came up with a current
3 temporary plate, and they came up with a valid New York State
4 plate, but they arrested him anyway for not having a registered
5 car, what would be your alternative argument that they had a
6 right to arrest him?

7 MR. JOHNSON: So what I'm arguing is under the theory
8 of qualified immunity that it's not clear that they established
9 a violation of the New York State Traffic Law is beyond
10 debate --

11 THE COURT: That's not why they arrested him. That's
12 a different question.

13 MR. JOHNSON: It's just the information that was
14 available to the officers at the time.

15 THE COURT: Right, but based on the information
16 available to the officers -- this isn't a qualified immunity
17 case. They either had probable cause or they didn't have
18 probable cause. If the information available to the officers
19 was the radio run that they gave the DA, I agree with you that
20 they had probable cause to arrest him. If the -- not radio
21 run, but if the run that they did came up with, Exhibit 24,
22 then a jury could reasonably find that they didn't have
23 probable cause to arrest him, right? Isn't that the sole issue
24 for this jury?

25 MR. JOHNSON: Right. I would like to also get back to

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1 the fabrication of evidence claim, because we bring up Garnett
2 and Ricciuti and the one thing that we haven't discussed is the
3 likely to influence a jury, because these charges were
4 dismissed by the prosecutor. In Garnett, the confession that
5 was at issue caused the prosecutor to increase the charges and
6 charged him with -- and you don't have that here. You don't
7 have anything on the record --

8 THE COURT: No, we have something more. The
9 information that he gave the DA, they didn't make the DA
10 increase the charges. They were the sole basis that the DA
11 went forward with writing this complaint.

12 MR. JOHNSON: He didn't go forward. He dismissed the
13 charges.

14 THE COURT: No, he wrote the complaint and charged the
15 defendant.

16 MR. JOHNSON: And then he talked Dennis into
17 dismissing the complaint.

18 THE COURT: Dismissal afterwards is always what
19 happens in a false arrest case. The prerequisite for a false
20 arrest case is that they were successfully dismissed.

21 MR. JOHNSON: I was talking about the fabrication
22 claim. They're saying that those two were related, so if
23 there's probable cause of arrest then there's no fabrication of
24 evidence claim, is that what we're saying?

25 THE COURT: No, the question is, what initiated this

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1 prosecution? Whether or not the fabricated evidence was the
2 basis on which the district attorney's office charged the
3 plaintiff with a crime.

4 MR. JOHNSON: I think that's a malicious prosecution
5 claim. How is that different, then, from the fabrication of
6 evidence claim?

7 THE COURT: It is a little different. I see it as a
8 little different, because I'm not sure I agree with the judges
9 who say -- and I'd have to look at the cases, I'm not sure I
10 agree with the judges who say that particular testimony in and
11 of itself, that if I go to the police and I say, "Arrest him,
12 he stole my wallet." And they arrest you and I did that just
13 because I was mad at you and I wanted to get you arrested.
14 That's a malicious prosecution.

15 If I take my wallet and I slip it in your back pocket,
16 I think that would additionally be a fabrication of evidence.
17 If I say, "Search the guy," like, you know, like in the
18 Titanic, when the guy stuck the jewel in his pocket and he
19 walked in and they say "search him" and they pull the jewel out
20 of his pocket; that's a fabrication of evidence. So accusing
21 him of stealing it was the malicious prosecution. Putting the
22 evidence in is his pocket so there's independent evidence to
23 prove that is the fabrication of evidence.

24 You don't agree that --

25 MR. JOHNSON: I was wondering, do you need a

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1 deprivation of liability after the --

2 THE COURT: I'll look at that more carefully factually
3 and legally. I'm not sure I agree that the deprivation of
4 liberty is simply I had to go back to court. But I'm not sure
5 that I could draw a time line with regard to, well, he was only
6 in jail just before they charged him instead of after they
7 charged him.

8 MR. JOHNSON: This provides a better clearer record
9 because the criminal complaint was drafted well after he was
10 released. So that's where you could come up with the
11 additional deprivation if there is one because the criminal
12 complaint wasn't drafted at the same time he was arrested. It
13 was six months later.

14 THE COURT: That's a critical analysis. The question
15 may be, and you're just talking about the fabrication of
16 evidence. The question may be when did he fabricate the
17 evidence? If he fabricated the evidence before he was arrested
18 in order to, in furtherance of a false prosecution against him.
19 You know, I'm not sure that you could simply say, well, he
20 wasn't formally charged until after his liberty was deprived,
21 even though I fabricated evidence to make sure that you were
22 prosecuted, held in jail for a couple of days and then get
23 convicted and hopefully go to jail for some more time.

24 MR. JOHNSON: First of all the record is clear that
25 information was forwarded to the prosecutor after he was

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1 released, it was a desk appearance ticket.

2 THE COURT: The information may have been forwarded
3 after, but the evidence was fabricated before.

4 MR. JOHNSON: That I don't know.

5 THE COURT: Well, I don't know either.

6 MR. JOHNSON: I don't know what the law says on that.
7 I think the law is pretty clear that has to be the forward, so
8 you could fabricate evidence and never forward it to a
9 prosecutor, you still have fabricated evidence but that's not a
10 fabricated evidence claim.

11 THE COURT: I have to look at the cases, because I'm
12 not sure that -- if you say to me that, let's say you charged
13 me with this offense and I decide that I'm going to create this
14 phony run, and they say, well, you're going to have to testify
15 and we need some evidence to convict this guy. I would say
16 okay, I will testify that I did the run and as a matter of fact
17 I'll give you the run that I got that shows that no information
18 came up, and I totally falsify that document. I give it to the
19 DA. You go to trial, you get convicted, the judge gives you
20 probation.

21 MR. JOHNSON: Well, yes.

22 THE COURT: Is it your position that there's no
23 fabrication of evidence because he didn't do a subsequent jail
24 time?

25 MR. JOHNSON: No, no, no. Because there's no

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1 deprivation after the -- he doesn't get probation, doesn't take
2 an ECD, he's not charged with bail. So, yes, if the individual
3 was charged with bail, if he had a trial and was convicted we
4 don't have any of these elements here. That's why I was
5 asking --

6 THE COURT: The reality is I think is that's much ado
7 about nothing in a way if there is a false arrest and a
8 malicious prosecution, then it's irrelevant whether there's a
9 fabrication of evidence.

10 MR. JOHNSON: That's why I'm saying just the confusion
11 over what a denial of fair trial claim is, is it -- I think the
12 way you describe it as a false arrest and malicious prosecution
13 I think you still need the subsequent deprivation, and you have
14 that in Garnett where you have the prosecutor increasing the
15 charges and you have that in Ricciuti where you have a trial.
16 Here you have a guy who had a desk appearance ticket and then
17 he's released and then weeks later you have the criminal
18 complaint forward and the DA doesn't prosecute the case and
19 that's that.

20 So I don't know if there's a fabrication of evidence
21 in claim in that.

22 THE COURT: The problem with that is technically there
23 is no such thing as a fabrication of evidence claim. It's a
24 denial of a fair trial. I'm not even sure that I agree and I
25 think the case law may be there so I may have to follow it, but

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1 I'm not sure I agree that there should be a denial of a fair
2 trial claim when there's never a trial. And there's no
3 evidence that it affected even a potential trial. But I think
4 there's probably case law out there sufficient enough to say
5 that it doesn't necessarily have to be an actual trial.

6 MR. JOHNSON: There has to be some deprivation, like
7 probation, for example, which would mean ECD, bail, if they set
8 bail based on an arraignment that's a restriction of liability.
9 I'm just trying to get a sense from you --

10 THE COURT: I think, look, I think if there's a
11 malicious prosecution, if the jury were to find a claim for
12 malicious prosecution and false arrest, obviously, there are no
13 separate damages for a fabrication of evidence, so it doesn't
14 really, it has no real substantive effect.

15 MR. JOHNSON: I think just for our office's sake we
16 wanted to know.

17 THE COURT: I understand. I'll look at that, unless I
18 see there's some arguable reason why there should be some
19 separate claim. It's the kind of case that I think I should be
20 kept simple for the jury rather than complicating it with a
21 bunch of theories when it comes down to the question really is
22 whether or not they arrested him and knew he hadn't done
23 anything wrong. I'm talking about in juror's layman's terms
24 and whether or not having arrested him what they did was they
25 decided that they would do whatever was necessary to prosecute

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1 him and to support that arrest by giving false testimony and by
2 fabricating a document and whether those acts were willful.

3 And, quite frankly, it's very hard for me to think of
4 a circumstance where an officer would deliberately perjure
5 themselves to frame an innocent person and falsify a document
6 to be consistent with that testimony to frame an innocent
7 person and that's not willful. That is a crime. So I'm not --
8 there's no way I can say that's not willful. That is
9 intentional and willful, if an officer would intentionally do
10 that. There's no way that the jury could find they altered
11 this document and not find that they willfully did so in order
12 to maliciously prosecute an innocent person that they knew
13 committed no crime.

14 So I think that the real question is -- I'm in a
15 situation that you're in. None of us in this room at this
16 point, and I don't know how you're going to explain it to the
17 jury, but none of us in this room can explain why there are two
18 different documents. None of us can. And whether or not down
19 at the DMV they hadn't inputted the information, I mean, I have
20 no explanation for why what the DA was given was different than
21 what you were given, and you talk about the implications and
22 the circumstantial evidence that the officers had with regard
23 to the plaintiff's alleged offense. Think about how strong the
24 circumstantial evidence is against the officers, given the fact
25 that they produced a document to the DA which is not by any

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1 other set of circumstances the actual document that should have
2 been generated at the time they made this request. I don't
3 know, I mean, there may be an innocent explanation for that,
4 but I don't know what it is but maybe, as I said, maybe the
5 officers are credible enough that they could convince a jury
6 they're fine, upstanding officers and they would never do such
7 a thing and even though they can't explain why it is they swear
8 under oath that they wouldn't do this and they didn't do this
9 and under no circumstances would they have done this, and that
10 the only reason they arrested this guy was because when they
11 ran the check to verify what was, what the circumstantial
12 evidence implied that he didn't have a valid, he didn't have a
13 car that was validly registered on the road and they verified
14 he didn't have a car that was validly registered on the road,
15 they arrested him. There's nobody, not even the plaintiff can
16 argue that if those are the set of facts that they would not
17 have had a right and a responsibility to do so and probable
18 cause to do so, but this case seems to be a lot more narrow of
19 an issue than when we first discussed this case.

20 The real question is, is the jury going to believe
21 that what the officers said they saw, the information they had,
22 was truly the information they had and whether or not there's
23 some way to reconcile with that that there's a document that
24 indicates that they had more information than they gave and
25 said to the DA and gave the document to the DA, because as you

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1 say we have not just the document, I have what I think is
2 sufficient as a complaint and probable cause for an arrest. He
3 says I observed forged temporary Virginia license plates. I
4 ran a computer check of the license plate numbers which
5 revealed that the numbers were not on file anywhere. And
6 that's not even, having that, there were multiple temporary
7 license plates affixed to the defendant's car and that the
8 numbers on one temporary license plate did not match the other.
9 And even there I think it falls short of probable cause, adding
10 this statement, because I ran a computer check of the license
11 plate numbers which revealed that the numbers were not on file
12 anywhere, I think that's probable cause because my position is
13 without that statement to the DA the DA would have never
14 charged this crime, the DA would not have written this
15 complaint without that last statement being in there and that
16 was critical to this prosecution, that he ran that plate and it
17 came back that it wasn't registered, because even if that
18 circumstance, even if it was registered, it's not the officer's
19 fault, but if it was registered, he knew it was registered, he
20 said it wasn't and then he gave them a document to reflect
21 that, which had to be altered to reflect that, that's pretty
22 serious. That's very serious. That's beyond the plaintiff's
23 lawsuit. If that's really what happened here, then these
24 officers are, they shouldn't be officers.

25 MR. JOHNSON: Right, and they testified that's not

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1 what happened.

2 THE COURT: Right. As I say, there may be some
3 reasonable explanation for that, but as I say, even if a jury
4 were not to believe them and not be given a reasonable
5 explanation doesn't -- I'm not here to say that the conclusion
6 is that these officers are bad officers and they're really
7 lying. They may be good officers and not lying. That doesn't
8 mean they could prove, that they could withstand the prima
9 facie case against them if this is the evidence put before the
10 jury. But it seems to me that I will look at all of these
11 other claimants and I think some of them will drop. I think
12 it's not likely the false arrest and malicious prosecution
13 claim is going to drop given those circumstances and that's a
14 credibility question for a jury.

15 Now, whether or not all these other claims are viable,
16 again, I'll look at them more carefully. I don't think they
17 all are viable, but I will look further and let you know very
18 quickly, particularly, if you're going to go to trial, whether
19 or not this case should be settled, given what your assessment
20 and what evidence may or may not be with regard to a trial
21 before a jury.

22 Mr. Harvis, did you want to add something?

23 MR. HARVIS: I don't want to take a lot of your
24 Honor's time. I want to add a couple of points. One is that
25 the fabrication of evidence claim, the reason why it's

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1 important, we have this claim in this case, is the reason that
2 Judge Woods said in the Garnett case and where he said that the
3 constitutional rights of a citizen are violated when a police
4 officer creates false information likely to influence a jury's
5 decision and forwards that information to prosecutors. The
6 entire course of a prosecution is corroded by fabricated
7 evidence. It is for that reason, no doubt, that the Second
8 Circuit has established a clear bright line rule; no arrest, no
9 matter how lawful or objectively reasonable, gives an arresting
10 officer or his fellow officers license to deliberately
11 manufacture false evidence against an arrestee. And I just
12 want to suggest that the facts of this case I believe emphasize
13 that point and I believe that they would --

14 THE COURT: But so does a malicious prosecution.

15 MR. HARVIS: Well, unlike a malicious prosecution
16 claim, a fabrication of evidence claim under Ricciuti and its
17 progeny, there is no defense of probable cause so it deprives a
18 plaintiff of an opportunity to achieve liberty if the
19 defendants are able to argue that there was probable cause to
20 defeat his claim. They can't do this with a fabrication of
21 evidence claim, so legally that's why this is significant here.
22 I want to point out --

23 THE COURT: On these facts, though, I think it would
24 be an inconsistent if not a repugnant verdict for the jury to
25 find that.

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1 MR. HARVIS: That's worth considering. I want to make
2 one other point of law. Under Poser v. Doherty, which is a
3 Second Circuit case, and other cases which have looked at this,
4 the actual probable cause in a malicious prosecution case has
5 to be for a chargeable offense so this whole argument about
6 parking tickets has nothing to do with the malicious
7 prosecution claim. Your Honor held that repeated appearances
8 in Court are sufficient to make out a deprivation of liberty,
9 that was the Rose v. Bethel case, and specifically in the
10 context of the DAT, the circuit in the Schwartz v. Ansonia case
11 sustained the deprivation of liberty for malicious prosecution
12 in the context of a desk appearance ticket. That's all I want
13 to say.

14 MR. JOHNSON: Your Honor, I bring up the denial of
15 fair trial claim, because of the same thing, because of a
16 malicious prosecution claim that the DA can offer a false
17 prosecution. They can't also provide alternate liability for
18 someone if there's no restriction of liberty after the DAT.
19 Then again, as you said, it would be repugnant to have one or
20 the other. It would also be weird for our officer's purposes
21 to have a sense that a DAT, absent any other action by the
22 prosecutor, is a denial of fair trial claim even if there is
23 probable cause for arrest.

24 THE COURT: What you give me as circumstance here is,
25 I just have to figure out how far that stretches. I agree with

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1 you that a stronger argument can be made if the officers issued
2 a DAT, the defendant showed up on that day and if when he was
3 showed up on that day he was told the case had been dismissed.
4 That's an easier argument to make. It's a more difficult
5 argument to make that they issued the DAT, the district
6 attorney's office writes up a complaint, a criminal complaint,
7 the defendant comes in and is arraigned on that criminal
8 complaint, the district attorney obviously overtly or by their
9 actions indicate they intend to prosecute that person for that
10 crime and that person has several subsequent appearances back
11 in court to defend against those charges.

12 MR. JOHNSON: That's not the facts that we have here
13 because, obviously --

14 THE COURT: These are the facts --

15 MR. JOHNSON: Obviously, when he conveys the facts to
16 the DA, the DA tells him he's not going to dismiss the charges.

17 THE COURT: No, not at the first appearance.

18 MR. JOHNSON: No he does.

19 (Discussion off the record)

20 THE COURT: I'll look at that.

21 MR. JOHNSON: He specifically says at his deposition,
22 he calls the DA, gives them the facts and is told the case is
23 going to proceed.

24 THE COURT: I didn't get that.

25 MR. HARVIS: Very quickly. He may have testified

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1 about that, but he's mistaken. He went there, signed the
2 criminal complaint, it was filed and then he was asked by the
3 DA to come back. There was notations in our evidence here in
4 the exhibits.

5 THE COURT: The plaintiff was asked to come back?

6 MR. HARVIS: No, that Dennis. They're leaving
7 messages at the precinct.

8 THE COURT: Now, but we're talking about what
9 deprivation did the plaintiff suffer.

10 MR. HARVIS: The plaintiff went back to court two
11 times after arraignment on the charges.

12 THE COURT: That's what I thought.

13 MR. JOHNSON: But they were unrelated to this charge.
14 Again, Officer Dennis didn't show up and then at the secondary
15 appearance the case was dismissed by the prosecutor.

16 THE COURT: Still, I'm saying --

17 MR. JOHNSON: Yes, I'm just also saying the case
18 doesn't say a court appearance is a deprivation of liberty for
19 a fabrication claim. For a malicious prosecution claim that's
20 different, but for a fabrication of evidence --

21 MR. HARVIS: It's the same analysis, your Honor.

22 MR. JOHNSON: But I'm not saying --

23 THE COURT: Okay, well, then let me let the court
24 reporter go. Thank you.

25 (Adjourned)